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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	
Joint Petition of the National Exchange Carrier Association, Inc. (NECA), National Rural Telecom Association (NRTA), National Telephone Cooperative Association (NTCA), Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and United States Telephone Association (USTA) for Expedited Interim Waiver of Section 52.33(a) of the Commission's Rules	CC Docket No. 95-116 CCB/CPD No. 99-9

OPPOSITION OF AT&T CORP.

Pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, and the Public Notice issued March 24, 1999, AT&T Corp. ("AT&T") hereby opposes the Petition For Expedited Interim Waiver ("Petition") filed by the National Exchange Carrier Association, et al. (collectively, "petitioners"). The petitioners seek to assign costs purportedly related to local number portability ("LNP") to their interstate access charge tariffs. Although they style their petition as an "interim waiver" of 47 C.F.R. § 52.33(a), petitioners actually offer nothing more than an unsupported and untimely demand that the Commission reconsider its recent LNP Cost Recovery Order,[1] which properly and unequivocally prohibited precisely the result sought here. The Petition does not even purport to satisfy the requirements either for waiver of the

[1] Third Report and Order, Telephone Number Portability, CC Docket No. 95-116, FCC 98-82 (released May 12, 1998), ¶ 75 ("LNP Cost Recovery Order").

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Commission's rules, or for interim relief. There is accordingly no basis on which the Petition could be granted even apart from its lack of substantive merit.

I. The LNP Cost Recovery Order Expressly Rejected Arguments That LECs Should Be Permitted To Recover LNP Costs Through Access Charges

The LNP Cost Recovery Order permitted, but did not require, incumbent LECs to recover their carrier-specific costs directly related to providing long-term number portability through a federally tariffed, monthly number portability charge that would apply to end users for no longer than five years, and also permitted ILECs to charge a federally tariffed rate for LNP query services they perform for other carriers.[2] In order to "help ensure that end-users are assessed number portability charges only where they are reasonably likely to be benefiting from number portability" and to "encourage carriers to install number portability," the Commission held that ILECs may only assess LNP surcharges on customers that are served from an LNP-capable switch.[3]

The petitioners complain that because in many cases they have not, and purportedly will not, implement LNP in their switches, they cannot assess LNP surcharges. Although petitioners presumably will not have any costs relating to implementing LNP, they note that they will bear certain expenses. First, like all telecommunications carriers, petitioners will be required to contribute to the costs of regional LNP databases ("NPAC/SMS"). The LNP Cost Recovery Order determined that Section 251(e)(2)'s competitive neutrality requirement

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2 Id., ¶ 9. Carriers that are not subject to rate regulation may recover their LNP costs "in any lawful manner." Id.

3 Id., ¶ 143.

dictated that these "shared costs" be allocated among all carriers in proportion to their end-user telecommunications revenues.[4]

Second, when they are the "N-1 carrier" delivering calls to an NXX in which a telephone number has ported, petitioners will be required either to perform LNP queries or to purchase query services. In this regard, petitioners also are in the same position as other carriers. IXCs and wireless carriers, for example, will ordinarily be the N-1 carrier on calls they deliver, and accordingly will have to perform necessary queries themselves or purchase query services.[5]

The LNP Cost Recovery Order observed that "almost all telecommunications carriers -- including LECs, IXCs, and CMRS providers -- will incur costs of number portability."[6] In fact, the costs that are the subject of the Petition -- NPAC/SMS and query costs -- will also be borne by IXCs and CMRS providers, carriers that operate in highly competitive markets and thus will face strong pressures to refrain from passing those costs on to end users in the form of retail price increases. Thus, although almost all carriers will incur costs for number portability, there is no basis to assume that all carriers are "guaranteed" recovery of these costs. Moreover, petitioners should not be heard to complain that it is somehow "unfair" for them to bear these costs because they do not benefit directly from LNP. It is plain that IXCs and wireless carriers also are not direct beneficiaries of portability. IXCs are unaffected by their customers'

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4 Id., ¶ 105.

5 It is important to note, moreover, that petitioners will only incur query charges for calls that they deliver to neighboring LECs' switches in which at least one number has been ported. When petitioners are acting as IXCs, they may recover any query charges they incur in the same fashion as other non-ILECs.

6 LNP Cost Recovery Order, ¶ 36, n.135.

ability to port their numbers, while CMRS customers will not be able to port for years in most cases.

The Commission has correctly found that "all telecommunications carriers will benefit from number portability,"[7] and has established a competitively neutral system to allocate costs. At bottom, the Petition is merely an effort by one group of carriers to foist their share of LNP costs on other carriers in the form of access charges. IXCs and CMRS providers do not cause the costs petitioners incur,[8] and do not benefit directly from them. There is simply no reasoned basis to permit petitioners to recover their LNP costs in access charges -- and the Petition offers none, instead simply arguing that they incur certain costs, and that someone else should pay for them.

The Commission's LNP docket generated extensive public comment and ex parte filings over a period of many months, and one of the most hotly contested questions in that proceeding was whether LECs would be permitted to recover their LNP costs through access charges. Although the Petition fails even to acknowledge the fact, the Commission compiled a lengthy record on this very issue when it issued the LNP Cost Recovery Order, and in that order expressly rejected claims that LNP costs should placed in access. In short, the Commission has already decided this issue, and it did so correctly and with the benefit of extensive public comment.

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7 Id., ¶ 114.

8 In fact, calls for which petitioners are required to perform or purchase queries by definition will not involve IXCs or wireless carriers at all.

Although the Petition argues that the result it seeks is competitively neutral,[9] it offers nothing to support that claim. The LNP Cost Recovery Order observed that § 251(e)(2)'s competitive neutrality requirement would be compromised if an ILEC could, in effect, force other carriers to pay for its LNP costs.

> If the Commission ensured the competitive neutrality of only the distribution of costs, carriers could effectively undo this competitively neutral distribution by recovering from other carriers. For example, an incumbent LEC could redistribute its number portability costs to other carriers by seeking to recover them in increased access charges to IXCs. Therefore, we find that section 251(e)(2) requires the Commission to ensure that both the distribution and recovery of intrastate and interstate number portability costs occur on a competitively neutral basis.[10]

Accordingly, the Commission held that:

> Because number portability is not an access-related service and IXCs will incur their own costs for the querying of long-distance calls, we will not allow LECs to recover long-term number portability costs in interstate access charges. Nor would it likely be competitively neutral to do so.[11]

Thus, although the Petition seeks to paint its claim as a matter of rectifying a Commission oversight or error, it is plain that the LNP Cost Recovery Order expressly and unequivocally considered, and rejected, the "flowback" recovery method petitioners propose.

II. The Petition Fails To Plead, Much Less To Prove, Circumstances That Satisfy The Commission's Requirements For Waiver Requests

A petitioner seeking waiver of the Commission's rules must show "good cause" as to why the rule should be suspended, amended, or revoked.[12] This requirement poses a "high

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9 Petition, p. 4.

10 LNP Cost Recovery Order, ¶ 39.

11 Id., ¶ 135 (footnote omitted).

12 47 C.F.R. § 1.3.

hurdle" because it requires a petitioner to "plead with particularity the facts and circumstances which warrant [the waiver]."[13] The Petition abjectly fails to meet this demanding standard.

The petitioners do not even purport to seek an exception on account of novel or changed circumstances, but rather ask the Commission to revise the LNP Cost Recovery Order in a manner that would simply eliminate the rules it established there. As the Commission recently observed, the discretion to grant waivers for good cause shown "does not contemplate that an agency must or should tolerate evisceration of a rule by waivers."[14] The Petition does nothing more than restate the Commission's rules and contend that they should be altered. The petitioners provide no support for their requested relief, arguing only that "Costs associated with these [LNP-related] charges are expected to be substantial."[15] Nothing in the Petition suggests, nor could it suggest, that the Commission was unaware of this issue when it decided the LNP Cost Recovery Order. To the contrary, as shown above, that order expressly declined to permit ILECs to recover their LNP costs through end-user surcharges except in cases in which they were actually offering portability in a given switch, and expressly rejected arguments that LNP costs should be recovered via access charges.[16]

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13 Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664, 666 (D.C. Cir. 1968); see also Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

14 Order, Pennsylvania Public Utility Commission Petition for Expedited Waiver of 47 C.F.R. Section 52.19 for Area Code 412 Relief, CC Docket No. 96-98, DA 97-675, ¶ 14 (released April 4, 1997) (quoting WAIT Radio, 418 F.2d at 1159).

15 Petition, p. 3.

16 See, e.g., Industrial Broadcasting Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970) (refusing to grant a waiver request because petitioner "presented no new expedients to the Commission not envisaged by the rules").

Finally, petitioners disingenuously characterize their petition as a request for "interim" relief, on the ground that they seek to include their LNP-related costs in access while their petition for reconsideration of the LNP Cost Recovery Order is pending.[17] However, the Petition fails even to attempt to satisfy the four-part test the Commission employs in evaluating requests for interim relief. The Commission generally considers four criteria in evaluating requests for interim relief: i) the likelihood of success on the merits, ii) the threat of irreparable harm if the relief is not granted; iii) the degree of injury to other parties if the relief is granted; and iv) whether granting the relief will further the public interest.[18] The petitioners cannot begin to satisfy any one of these four criteria.

First, as shown above, the LNP Cost Recovery Order unequivocally considered and rejected the very issue the Petition addresses, and did so on the basis of an extensive record. Nothing in the Petition or in the petitions for reconsideration of the order provides any basis for the Commission to revisit its conclusions. Second, even if petitioners were ultimately to prevail on their petition for reconsideration, they cannot plausibly contend that they would suffer irreparable harm if the instant Petition were denied. The petitioners allege only that they will incur certain unquantified expenses relating to LNP. The Commission could easily permit them to recover those costs via access charges at a later date, if it chose to do so. It is black-letter law that monetary losses do not generally constitute irreparable harm of the type that supports preliminary relief.[19] Third, if the instant request for interim relief were granted but the Commission later denied petitioner's

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17 See Petition, p. 4.

18 See, e.g., Memorandum Opinion and Order, AT&T Corp. v. Ameritech Corporation, File No. E-98-41, FCC 98-141, released June 30, 1998.

19 See, e.g., Sampson v. Murray, 415 U.S. 61, 90 (1974).

request for reconsideration of the LNP Cost Recovery Order, then IXCs and wireless carriers would be injured by having been forced to pay unjustified higher access fees that they will have no means to recover.[20] Fourth, granting the Petition plainly would not serve the public interest. The Commission has already found that § 251(e)(2)'s competitive neutrality mandate prohibits carriers from shifting their LNP costs to other telecommunications providers. The relief the Petition requests would permit precisely this result, and would thereby contravene the public interest as determined by Congress when it enacted § 251(e)(2). Similarly, to permit ILECs to include LNP-related expenses in access would run directly counter to the Commission's efforts to drive access charges to their true cost, and to cease using those charges to subsidize ILECs' operations.

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[20] Even assuming that, following a decision rejecting petitioners request for reconsideration of the LNP Cost Recovery Order, the Commission ordered petitioners to reduce their access charges by some amount reflecting LNP-related charges that had formerly been included in access pursuant to the interim relief the Petition requests, third parties would not be made whole. There is no way to ensure that the same third parties that formerly were forced to pay higher access charges would obtain refunds of all of the monies they were required to pay under an interim relief order.

CONCLUSION

For the reasons stated above, the Commission should deny the instant Petition and affirm the well-considered rules it enacted in the LNP Cost Recovery Order.

Respectfully submitted,

AT&T CORP.

By _____

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April 8, 1999

CERTIFICATE OF SERVICE

I, Rena Martens, do hereby certify that on this 8th day of April, 1999, a copy of the foregoing "Opposition of AT&T Corp." was served by U.S. first class mail, postage prepaid, to the parties listed below.

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